

CASE SUMMARY

Broward County Case Number: **CACE02004211**
 Court Type: **Civil Division - Circuit Court**
 Incident Date: **N/A**
 Court Location: **Central Courthouse**
 Magistrate ID / Name: **N/A**

State Reporting Number: **062002CA004211AXXXCE**
 Case Type: **Products Liability**
 Filing Date: **03/01/2002**
 Case Status: **Disposed**
 Judge ID / Name: **03 Henning, Patti E.**

Style: **George McCormack , et al Plaintiff vs. Keller Ladders Inc Defendant**

| Party Detail | | | | | | |
|-------------------|--------------------|-----|------|--------|--------|---|
| Party Type | Party Name | Sex | Race | D.O.B. | D.O.D. | Attorneys / BarID ★ Denotes Lead Attorney |
| Plaintiff | McCormack, Deborah | | | | | ★ Herman, Peter G Retained BarID: 353991 |
| Plaintiff | McCormack, George | | | | | ★ Herman, Peter G Retained BarID: 353991 |
| Doing Business As | Kli Global Inc | | | | | |
| Now Known As | Kkl Inc | | | | | |
| Defendant | Keller Industries | | | | | |
| Defendant | Keller Ladders Inc | | | | | ★ Mowers, Jeffrey Arthur Retained BarID: 508240 |

Key Dates - Future Scheduled Events

There is no key date information available for this case.

Related Cases

There is no related case information available for this case.

Case Detail

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| <p>6</p> <p>1 very same thing as the manufacturer. That's their 2 position now. That's what they are saying now. 3 That's what their response would have been if a 4 motion for summary judgement was filed. 5 They're doing -- they are saying precisely now 6 what they would have said if we had filed a motion 7 for summary judgement, except they are now attempting 8 to do it after the fact without any evidentiary 9 support for that theory. 10 May I continue? 11 THE COURT: Yeah. Let me ask you this 12 question. 13 MR. KAULAS: Sure. 14 THE COURT: Did you at any time present that 15 defense to the jury, that you were not the 16 manufacturer of this ladder? 17 MR. KAULAS: Yes. 18 THE COURT: I don't remember that coming up. 19 MR. KAULAS: We read the stipulation of the 20 parties to the jury. The stipulation of the parties 21 was -- 22 THE COURT: That's right. That just didn't 23 seem to be the big thrust of this case. 24 MR. KAULAS: Well, the thrust of the case was 25 based upon the fact that the plaintiff sued us as a</p> | <p>8</p> <p>1 suit February 26 -- 2 THE COURT: Wait a minute. This ladder was 3 manufactured in '94, wasn't it? 4 MR. KAULAS: '96. April '96. I'm sorry. 5 THE COURT: I'm reading your defendant's 6 motion, and it says it was explained to The Court 7 that the ladder was manufactured in 1994. 8 MR. KAULAS: That's correct. I'm sorry. I'm 9 confusing my -- there's another April '96 date. I 10 will correct the record. The ladder was manufactured 11 in '94. Okay. The date of accident is 2000. Suit 12 was filed February 26, '02. 13 Under the State of Florida rules, the 14 plaintiffs would have four years in which to file 15 suit. In other words, they could have filed suit 16 against the appropriate manufacturer as of October 3, 17 if you will, 2004. 18 Interrogatories were served upon my client. 19 The first set of interrogatories were May 30th of 20 '02. And at that time, the defendant stated in 21 answers to interrogatories that it did not know the 22 manufacturer of the ladder. The denial of allegation 23 of manufacturer was on file. 24 In the second set of interrogatories, the 25 plaintiff's attorney obviously is aware of the fact</p> |
| <p>7</p> <p>1 manufacturer and we were not. That's one of the 2 elements that the plaintiff had to prove. They 3 didn't prove it. They proved nothing. And 4 furthermore, not only did they not prove that 5 particular element, they stipulated to the contrary. 6 However, a stipulation is not evidence until 7 one offers that stipulation into evidence. When we 8 offered that stipulation into evidence, the issue no 9 longer existed. We were -- we had proven the 10 position that we took. 11 To that point in time, there was no issue when 12 we placed that stipulation into evidence. The 13 stipulation, if you will, trumped any claim that KLI 14 was the manufacturer of the product. 15 May I continue, Your Honor? 16 THE COURT: You may. 17 MR. KAULAS: The next position the plaintiff 18 takes is that somehow these two entities, KLI and 19 Keller Industries, Inc. are identical. And my 20 prefatory remarks are, of course, they never 21 pleaded that, but I want to address that particular 22 issue. 23 By way of background, the date of manufacture 24 of the ladder was April of 1996. The date of 25 accident was October 2, 2000. The plaintiff filed</p> | <p>9</p> <p>1 that the manufacturer of the ladder is not the entity 2 that the plaintiffs sued. And I read you to a 3 question from the second set of interrogatories, 4 Page 2. "Please identify -- and this is a quote -- 5 "Please identify with specification the business 6 relationship between the manufacturer of the subject 7 ladder giving rise to this action and KLI, Inc. 8 setting forth any agreement between the manufacturer 9 and KLI, Inc." 10 The answer is, "The ladder at issue was 11 manufactured by Keller Industries, Inc. Keller 12 Industries declared bankruptcy in April of 1996 in 13 Delaware. Keller Industries consisted of a ladder 14 division and building products division. In 1996, 15 KUA Corp. purchased the ladder division of Keller 16 Industries, including the Keller trade name." 17 And the answer goes on. 18 At this particular point, The Court can take 19 judicial notice of pleadings, if you will, and 20 procedures in other courts. And unfortunately, I 21 only have one copy. But I have the bankruptcy filing 22 out of the U.S. District Court, U.S. -- United States 23 Bankruptcy Court District of Delaware, the docket. 24 The docket indicates that on April 2, 1996, 25 there was a voluntary petition under Chapter 11, etc.</p> |

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| <p style="text-align: right;">10</p> <p>1 The entity which filed for bankruptcy was Keller 2 Industries, Inc. And the docket shows that that 3 particular proceeding continued in bankruptcy until 4 the motion for final decree was November 19, 2003. 5 So the entity that manufactured the accident 6 ladder existed, was in bankruptcy, continued in 7 bankruptcy. When this lawsuit -- when the accident 8 occurred, when this lawsuit was filed, when the 9 second set of interrogatories were answered, and for 10 over a year after that particular time, plaintiff 11 never chose to file suit against the manufacturer of 12 the ladder. Didn't do it. Despite the fact that 13 they had answers to interrogatories which stated the 14 business relationship between "the manufacturer" and 15 the entity which they had sued. 16 Plaintiff now takes the position that, again, 17 without filing any pleading whatsoever on the point, 18 that somehow there's an identity between an entity 19 that is in bankruptcy in the Federal District Court 20 in Delaware and an entity which they sued. 21 They suggest because two individuals, 22 Mr. Doss, Mr. Allen, who were president and CFO of 23 Keller Industries, Inc., eventually became employed 24 by Keller Ladders, Inc., that somehow we have an 25 identity of parties. Again, they have never pleaded</p> | <p style="text-align: right;">12</p> <p>1 THE COURT: I will reserve judgment on that. 2 MR. KAULAS: That's an interesting point, 3 given the fact that counsel files a motion in which 4 he makes a statement of somehow the defense has 5 somehow misled someone and there is no affidavit, 6 there's nothing other than the statement, and an 7 implication which we think is inappropriate. 8 So therefore, it is obvious from the 9 interrogatory that was sent by the plaintiff's 10 attorney, when he had two years in which to file suit 11 against the manufacturer, that he was fully aware of 12 the fact that the manufacturer of the ladder and the 13 defendant that he sued were two different corporate 14 entities. 15 The case then goes to trial. The stipulation 16 is agreed upon before trial concerning the 17 manufacturer's identity. The stipulation from an 18 evidentiary standpoint is meaningless until it's 19 offered into evidence. And when that stipulation was 20 offered into evidence at the onset of the plaintiff 21 -- excuse me -- the defense case, at that juncture 22 there was no evidence whatsoever that the defendant, 23 KLI, was responsible for the manufacture of the 24 ladder. 25 And at that juncture, the plaintiff had failed</p> |
| <p style="text-align: right;">11</p> <p>1 this. They're arguing it after the fact. 2 I'm going to provide The Court with an 3 affidavit which is the recorded in the record. The 4 affidavit, which is a listing of the directors and 5 officers of KUA Corp, Keller Ladders, Inc, and KLI, 6 Inc. since 1996. 7 If The Court cares to peruse that, you will 8 see out of the numerous individuals that are either 9 officers or directors, that Mr. Doss and Mr. Allen no 10 longer were employed as -- no longer employed as a 11 matter of fact, but neither an officer or a director 12 of KLI, Inc. subsequent to 1996, I believe. Just 13 make sure. I'm sorry. Subsequent to 1997. 14 So as a result, at the time the accident 15 occurred, at the time the lawsuit was filed, at the 16 time the answers to interrogatories pointed out the 17 specific corporate history, these individuals had 18 been long gone as president and as CFO. 19 I would offer that into record as the 20 affidavit of Paul Kaulas with the attachment 21 Exhibit A showing the list of officers. 22 THE COURT: Any objection? 23 MR. HERMAN: Yeah. I object. I don't see any 24 reason for an affidavit to come into evidence at this 25 juncture of the case.</p> | <p style="text-align: right;">13</p> <p>1 to prove an essential portion of the case which he 2 had -- which he had pleaded, i.e. the defendant that 3 he had sued manufactured the product. 4 Plaintiff takes the position now after the 5 fact that there is an identity, if you will, of these 6 entities; a position which he never pleaded, which he 7 never approved. He simply responds that somehow 8 that either, A, he was misled in some fashion with 9 the interrogatory which he asks. And the response 10 that he's given is unequivocal that he's fully, fully 11 aware of the differentiation between manufacturer and 12 the entity that he sued, and the response that is 13 given to the interrogatory. 14 If plaintiff believed that somehow there was 15 an identity between those two corporate -- corporate 16 -- corporations, then under those circumstances, it 17 was his responsibility to file an amended pleading, 18 in which he attempted to prove that there was an 19 identity; in other words, attempted to pierce the 20 corporate veil between KLI and an entity which was in 21 bankruptcy in Delaware. 22 He never filed such a pleading. And the 23 obvious reason why he didn't file such a pleading is 24 because there is no identity. They are separate 25 corporate entities.</p> |

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| <p style="text-align: right;">14</p> <p>1 Anticipating the plaintiff's now position, 2 plaintiff now wants to amend his complaint after the 3 fact saying that, I guess, that there is somehow a 4 misnomer. And of course that position is entirely 5 different from the position that he takes in response 6 to our motion for a verdict NOV. He now says he 7 wants to amend his complaint. And of course he's 8 violated the rules, by virtue of failing to 9 attach this proposed amended complaint. 10 We still have no idea what he intends to say, 11 what he intends -- who he intends to sue, or what the 12 basis or theory of that lawsuit is, based upon some 13 sort of pleading. As a matter of fact, one 14 stage in the -- during the trial, The Court indicated 15 that it would allow plaintiff to amend, and no such 16 amendment was ever forthcoming; and likewise, hasn't 17 been forthcoming thus far. 18 Therefore, I would reserve my responses with 19 reference to motion to amend because plaintiff has 20 added that as an add-on motion. 21 THE COURT: Who do you contend is the real 22 party and interest in this case as far as the 23 defendant is concerned? 24 MR. KAULAS: Keller Industries, Inc. is the 25 manufacturer of the ladder.</p> | <p style="text-align: right;">16</p> <p>1 of any statutory cause of action which gives rise 2 to any damages which are penal in nature." 3 "On July 17, 1996, KUA Corporation changed its 4 name to Keller Ladders, Inc. On October 29, 1999, 5 Keller Ladders, Inc. sold its assets, including the 6 Keller tradename, to Werner Company, Inc, not 7 including liabilities. Since part of Werner's 8 purchase agreement included the Keller tradename, 9 Keller Ladders, Inc. changed its name to KLI, Inc. 10 on October 29, 1999. On May 3, 2000, KLI, Inc. 11 changed its name only in Florida to KLI, Inc, doing 12 business in the State of Florida as KLI Global, Inc." 13 It would appear to me from that answer that 14 Keller Ladders, Inc. was still responsible for any 15 liabilities that arose out of the manufacture of that 16 ladder by its predecessor. 17 That's your answer. Not his answer. 18 MR. KAULAS: I realize that. But you have to 19 sue Keller Industries, Inc. You have to sue them in 20 order to get indemnity from KLI. 21 THE COURT: I would -- I'm not sure I agree 22 with that. Keller Industries sold all of its assets, 23 including its liabilities, to a corporation that 24 later became Keller Ladders, Inc. And they were 25 defendant -- Keller Industries would defend by saying</p> |
| <p style="text-align: right;">15</p> <p>1 THE COURT: The one that was in bankruptcy? 2 MR. KAULAS: Is. Yes. Was in bankruptcy. 3 THE COURT: How about your response to 4 Interrogatory 1? 5 MR. KAULAS: Which -- would you read the 6 interrogatory, Judge? 7 THE COURT: "Please identify with specificity 8 the business relationship between the manufacturer of 9 the subject ladder giving rise to this action and 10 KLI, Inc., setting forth any agreement between the 11 manufacturer and KLI, Inc." 12 And the response is, "The ladder at issue was 13 manufactured by Keller Industries, Inc. Keller 14 Industries declared bankruptcy in April of 1996 in 15 Delaware. Keller Industries consisted of a ladder 16 division and a building products division. In 1996, 17 KUA Corporation purchased the ladder division of 18 Keller Industries, including the Keller trademark. 19 As a part of the transaction, Keller Industries 20 changed its name to Relic, Inc. At the time of KUA 21 Corporation's purchase of Keller Industries Ladder 22 Division, KUA Corporation assumed certain product 23 liabilities of Keller Industries Ladder Division, but 24 did not assume any liability for damages which are 25 punitive or exemplary in nature, or which arise out</p> | <p style="text-align: right;">17</p> <p>1 that we are no longer the real party of interest. We 2 sold our company, including its liabilities, to 3 Keller Ladders, Inc. 4 MR. KAULAS: That would be true if, in fact, 5 there was a pleading on file which laid out a claim 6 that Keller Industries, Inc. was responsible for the 7 liabilities of -- excuse me -- that Keller Ladders, 8 Inc. was responsible for the liabilities of Keller 9 Industries, Inc. And Keller Ladders, Inc. would 10 then respond that based upon the asset purchase 11 agreement between these parties, you must sue Keller 12 Industries, Inc. Because there are no third-party 13 beneficiaries to that agreement. • 14 The plaintiff failed to allege liability based 15 upon an agreement. 16 THE COURT: That's why he wants to amend. 17 MR. KAULAS: No. He wants to add a new party. 18 He's taken the entirely different position. He takes 19 the position in our response for verdict NOV that we 20 are responsible by virtue of this answer to 21 Interrogatory -- which incidentally, he never offered 22 into evidence if, in fact, it was going to be the 23 basis of some pleading. 24 State of Florida still requires that if you 25 have a theory of liability, you must prove it. The</p> |

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| <p>1 theory of liability expressed by the plaintiff in 2 this case was that KLI manufactured the ladder. 3 That was the theory. The theory was not that KLI is 4 responsible based upon this interrogatory answer. 5 If, in fact, that was the pleading, then we would 6 have gone forward with the proof of the agreement to 7 show that, no, that's not the meaning of this 8 particular answer to interrogatory. The meaning of 9 this answered interrogatory is a snapshot, if you 10 will, of the arrangement between the parties with, if 11 you will, what is the relationship? The relationship 12 has nothing to do with responding to a pleading. 13 Plaintiff never pleaded that KLI, if you will, 14 was responsible by virtue of some agreement. They 15 never pleaded that. So we never responded to such a 16 pleading. 17 Now plaintiff takes the position -- it's like 18 a -- they're saying in essence -- 19 THE COURT: If they had pled that, what would 20 have been your response? 21 MR. KAULAS: Our response would be the 22 agreement. 23 THE COURT: The agreement said that -- 24 MR. KAULAS: The agreement says -- 25 THE COURT: -- Keller Ladders, Inc. is</p> | <p>1 sue the original manufacturer if that has -- the 2 original manufacturer, some time before the accident, 3 sold its business to somebody else. 4 MR. KAULAS: The Court's quandary in this 5 regard is reasonable and legitimate, but The Court's 6 quandary isn't a pleading. In other words, what 7 Mr. Herman could have done, or should have done, 8 really isn't before you on the issue for a verdict 9 NOV. What Mr. Herman should have done, of course, 10 was file lawsuit against Keller Industries, Inc., 11 which was pointed out by the answer to 12 interrogatories. They had two years in which to do 13 it. 14 THE COURT: That's where you and I differ. I 15 think to step a -- to establish a claim, I don't 16 think they had to sue Keller Industries by virtue of 17 that agreement. 18 MR. KAULAS: Well, what pleading -- I'm just 19 rhetorically -- what pleading has the agreement in 20 it? What pleading has -- if in fact this 21 interrogatory, the four corners of this interrogatory 22 establish a cause of action, where was it pleaded? 23 We say this -- the four corners of this interrogatory 24 don't create a cause of action, and therefore the 25 plaintiff must at least plead something so we can</p> |
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| <p>1 responsible. 2 MR. KAULAS: Only if Keller Industries, Inc. 3 is sued. They must be sued. There are no 4 third-party beneficiaries to the agreement. 5 THE COURT: I don't see that in the -- in the 6 answer to the interrogatory. 7 MR. KAULAS: That wasn't the question to the 8 interrogatory. The question poised isn't in the 9 interrogatory. 10 If I may continue. 11 THE COURT: Well, I'm not sure I agree with 12 the statement that the plaintiff is prohibited from 13 suing the purchaser of the liabilities of its 14 predecessor corporation in order to state a valid 15 cause of action. I think that he can sue Keller 16 Industries -- or Keller Ladders, Inc. And if, in 17 fact, Keller Ladders, Inc. did not assume the 18 liabilities in the purchase from Keller Industries of 19 the ladder division, then the burden is on the 20 defendant to in some way allege that as a defense 21 that, no, we purchased the ladder company, but we 22 didn't purchase the liabilities. 23 Then he may have to go against the original 24 ladder company. I'm just thinking out loud on that. 25 Because I don't think it's a condition precedent to</p> | <p>1 address if, in fact, that's his position. 2 If that's his position -- If, in fact, that's 3 his position, why wasn't it said in the pleading? 4 THE COURT: That's why he's making a motion to 5 amend. 6 MR. KAULAS: No. No. Excuse me. No. At 7 this juncture he is now saying, I want to sue Keller 8 Industries, Inc. at this time. 9 THE COURT: Well, I thought the motion during 10 the course of the trial was to amend to name the 11 original manufacturer as the defendant because the 12 original manufacturer and Keller Ladders are one in 13 the same. 14 MR. HERMAN: That's correct. 15 MR. KAULAS: Well, that's what he says. He's 16 saying they are one in the same. 17 THE COURT: Because of the assumption by 18 Keller Ladders, Inc. of the liabilities of Keller 19 Industries. 20 MR. KAULAS: Well, during the course of the 21 trial -- during the course of the trial this 22 interrogatory was never read to The Court, was never 23 offered to the jury. None of this matter -- 24 THE COURT: Seemed that there was never an 25 issue on whether or not Keller Ladders, Inc. assumed</p> |

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| <p style="text-align: right;">22</p> <p>1 the liabilities of Keller Industries. Was there ever</p> <p>2 an issue on that? You're the ones that created --</p> <p>3 you're the one's that gave them the information that</p> <p>4 that was the case.</p> <p>5 MR. KAULAS: We told them. They never amended</p> <p>6 their pleadings.</p> <p>7 THE COURT: That's why he made the motion to</p> <p>8 amend to have the verdict confirmed or the judgment</p> <p>9 -- or the pleadings confirmed to the judgment or</p> <p>10 vice-versa, and that can occur when the subject to be</p> <p>11 corrected is strictly a ministerial type of thing. I</p> <p>12 mean, seems to me Keller Ladder Inc., Keller</p> <p>13 Industries, Inc., and Keller Ladders are one in the</p> <p>14 same.</p> <p>15 MR. KAULAS: That's --</p> <p>16 THE COURT: Your defense wouldn't have been</p> <p>17 any different if they had sued Keller Ladders</p> <p>18 -- Keller Industries, would it?</p> <p>19 MR. KAULAS: Of course it would be.</p> <p>20 THE COURT: What would it have been? No. I</p> <p>21 mean as to the substance, not as to the formal part.</p> <p>22 MR. KAULAS: As far as the trial of the</p> <p>23 lawsuit, if they alleged that they could pierce the</p> <p>24 corporate veil, which they are responding now --</p> <p>25 they're saying, we can pierce corporate veil. At</p> | <p style="text-align: right;">24</p> <p>1 but if you don't buy that one, we want to amend our</p> <p>2 complaint now, and we want to sue another entity</p> <p>3 entirely.</p> <p>4 They're saying -- they are saying, first off,</p> <p>5 the reason we didn't sue Keller Industries, Inc. is</p> <p>6 because somehow we didn't think we had to --</p> <p>7 THE COURT: But if I grant their motion as</p> <p>8 they put it at trial, the second motion that you --</p> <p>9 that they raised is moot.</p> <p>10 MR. KAULAS: I'm sorry?</p> <p>11 THE COURT: If I go ahead and affirm my action</p> <p>12 at -- what I did at the trial, allowing them to amend</p> <p>13 in so far as the Industries, Inc. is concerned, then</p> <p>14 the second issue about naming Industries, Inc. as a</p> <p>15 second party for them to sue is moot. Correct?</p> <p>16 MR. KAULAS: I'm not quite sure how it can be</p> <p>17 moot.</p> <p>18 THE COURT: Well, because they -- they have</p> <p>19 got their judgement, and they have got the right</p> <p>20 party in the judgement. So why would they want to</p> <p>21 sue them again?</p> <p>22 MR. KAULAS: I'm -- I'm at a loss.</p> <p>23 THE COURT: Maybe I misunderstood you. You</p> <p>24 said that now, before me, they have two-fold motion,</p> <p>25 right?</p> |
| <p style="text-align: right;">23</p> <p>1 least that's one of the responses they make.</p> <p>2 THE COURT: I don't know if that's a correct</p> <p>3 response. What I'm saying is, they are just</p> <p>4 following the trail of the liabilities of Keller</p> <p>5 Industries.</p> <p>6 MR. KAULAS: Based upon what?</p> <p>7 THE COURT: Based on your interrogatory.</p> <p>8 MR. KAULAS: They have never offered it into</p> <p>9 evidence.</p> <p>10 THE COURT: Based on -- you asked to take</p> <p>11 judicial notice of all this stuff, so --</p> <p>12 MR. KAULAS: It -- wait a second. I'm</p> <p>13 responding to what they have put forth in a response,</p> <p>14 Judge. I'm -- and of course he's objecting to it.</p> <p>15 So my point being, in this -- if, in fact, they</p> <p>16 believed that they had a cause of action against KLI</p> <p>17 based upon an asset purchase agreement, why didn't</p> <p>18 they plead it? They never pleaded it. Never did.</p> <p>19 We say, no --</p> <p>20 THE COURT: That's why they're making the</p> <p>21 motion to amend.</p> <p>22 MR. KAULAS: Well, as I read what they are</p> <p>23 doing now, they are taking -- taking two positions</p> <p>24 simultaneously. They are saying, Judge, we were led</p> <p>25 down the garden path by the answer to interrogatory,</p> | <p style="text-align: right;">25</p> <p>1 MR. KAULAS: They have a response to our</p> <p>2 motion for a verdict NOV. That's the response. The</p> <p>3 response --</p> <p>4 THE COURT: Name again -- say it again what</p> <p>5 the two-part motion is, or two-part response that</p> <p>6 they have affirmed, as you last stated it.</p> <p>7 MR. KAULAS: Okay. As I -- as I interpret</p> <p>8 what they filed in response to our motion verdict</p> <p>9 NOV, what I -- they say two things in this particular</p> <p>10 document.</p> <p>11 THE COURT: Okay.</p> <p>12 MR. KAULAS: The first thing.</p> <p>13 THE COURT: One.</p> <p>14 MR. KAULAS: One is, they were misled by our</p> <p>15 response to interrogatories. They didn't really have</p> <p>16 to file suit against Keller Industries, Inc. based</p> <p>17 upon the answers to interrogatories. That's their</p> <p>18 one position.</p> <p>19 THE COURT: Okay.</p> <p>20 MR. KAULAS: Then they recite throughout the</p> <p>21 document that The Court gave them leave to amend and</p> <p>22 they amended their complaint. They haven't done</p> <p>23 that. They have never amended their complaint. They</p> <p>24 never filed an amendment to The Court. So all the</p> <p>25 stuff about they amended their complaint and The</p> |

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| <p style="text-align: right;">26</p> <p>1 Court gave them leave, I have doubt whether The</p> <p>2 Court, in fact -- based upon the record as I read it,</p> <p>3 The Court actually gave them leave to amend.</p> <p>4 But assuming, for discussion sake, The Court</p> <p>5 did give them leave to amend, they have never</p> <p>6 followed through, they have never filed anything,</p> <p>7 they have never amended anything. And then</p> <p>8 furthermore, if The Court -- we would take the</p> <p>9 position that if The Court gave them the leave to</p> <p>10 amend, there's no record that just justifies an</p> <p>11 amendment based upon what The Court heard, at least.</p> <p>12 The Court didn't see any interrogatories. The Court</p> <p>13 saw nothing.</p> <p>14 There's about a paragraph of a representation</p> <p>15 made by Mr. Herman. I don't think The Court would</p> <p>16 grant leave to amend based upon that sort of record.</p> <p>17 But assuming, for discussion sake, that's what they</p> <p>18 did, they still haven't amended their complaint.</p> <p>19 Now what they're doing is they're attempting</p> <p>20 to amend -- they filed an add-on motion here to amend</p> <p>21 their complaint. That matter has not been heard.</p> <p>22 That raises an entirely different issue, and that is</p> <p>23 whether or not you can add another party to a lawsuit</p> <p>24 under these circumstances. Of course, we take the</p> <p>25 position, and the case law supports us, that that's</p> | <p style="text-align: right;">28</p> <p>1 or you, because you won. The mere fact that they may</p> <p>2 go against Keller Industries, Inc., that's no -- not</p> <p>3 your problem. That's another entity, as you're</p> <p>4 saying. Maybe another lawyer. Another insurance</p> <p>5 company. Who knows. So that's not a problem that</p> <p>6 you have. It would just seem to me that that's an</p> <p>7 issue of whether or not Keller Ladders, Inc. was the</p> <p>8 real party of interest and the case should have been</p> <p>9 determined by a motion for summary judgment and the</p> <p>10 case gone away. Period. Bingo. Out. Ended.</p> <p>11 But that's just a matter of observation. It</p> <p>12 has really nothing determinative of the very issues</p> <p>13 before me today.</p> <p>14 Are you finished?</p> <p>15 MR. KAULAS: Yes.</p> <p>16 MR. HERMAN: Judge, in brief response --</p> <p>17 actually --</p> <p>18 THE COURT: Don't be brief just because</p> <p>19 you think you know what I'm going to do, because I'm</p> <p>20 not sure yet. You better be thorough in order to --</p> <p>21 MR. HERMAN: I may not be that brief.</p> <p>22 Notwithstanding the fact that representation from</p> <p>23 both counsel at the trial was that I would have no</p> <p>24 problem in terms of the stipulation with regard to</p> <p>25 manufacturer, manufacturing of the ladder and putting</p> |
| <p style="text-align: right;">27</p> <p>1 absurd. Especially when they have total, complete,</p> <p>2 unadulterated knowledge that there were two separate</p> <p>3 corporate entities. There is no confusion here.</p> <p>4 THE COURT: Okay. Well, it just is -- without</p> <p>5 making a conclusive finding on the issue, it just</p> <p>6 seems to me, by virtue of that response, the</p> <p>7 plaintiff was justified in relying that Keller</p> <p>8 Ladders, Inc. was the real party of interest in this</p> <p>9 case when the response says that Keller Ladders, Inc.</p> <p>10 bought the liabilities of the manufacturer of the</p> <p>11 ladder. And I really didn't see that as one of the</p> <p>12 issues in the case.</p> <p>13 I tried a case with whether or not the ladder</p> <p>14 was defectively manufactured, and it was the</p> <p>15 proximate cause of the plaintiff's injuries. That's</p> <p>16 the case I tried -- I thought I was trying. And I</p> <p>17 get back to my original proposition this morning.</p> <p>18 If, in fact, the defendant felt that it was not</p> <p>19 liable, because legally liable that it should have</p> <p>20 determined that, at least attempted to make that</p> <p>21 determination to a motion for summary judgment.</p> <p>22 And whether or not they could have amended at</p> <p>23 that point if they lost the motion for summary</p> <p>24 judgement, and Keller Ladders, Inc. was out, should</p> <p>25 be no problem -- no concern of Keller Ladders, Inc.</p> | <p style="text-align: right;">29</p> <p>1 it into the stream of commerce.</p> <p>2 On my witness list was Lillian Macia. You</p> <p>3 remember her name coming up. She was the corporate</p> <p>4 representative of KLI who answered all of the</p> <p>5 interrogatories, who answered insurance purposes</p> <p>6 letters, representing to us that KLI was the</p> <p>7 responsible party. Okay? I had her on my witness</p> <p>8 list. I also asked you at trial in the event that I</p> <p>9 need to call her for rebuttal, I requested that. It</p> <p>10 neither was granted or denied. But there were</p> <p>11 representations made to me of that effect. That's</p> <p>12 not on the record, okay.</p> <p>13 But what is on the record is the stipulation</p> <p>14 that he talks about. I didn't follow the convoluted</p> <p>15 argument that Mr. Kaulas stated with regard to that</p> <p>16 stipulation. The fact of the matter is, is when the</p> <p>17 stipulation was put in that Keller Industries was the</p> <p>18 manufacturer of the ladder, at that point in time --</p> <p>19 and this is where Mr. Kaulas gets liability and</p> <p>20 indemnity confused. Two times that's confused. At</p> <p>21 that point in time, I also moved to amend the</p> <p>22 stipulation. And you granted that motion to amend</p> <p>23 the stipulation to reflect --</p> <p>24 THE COURT: I'm sorry. Go ahead.</p> <p>25 MR. HERMAN: My understanding is you not only</p> |

8 (Pages 26 to 29)

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| <p>1 granted the motion to amend the pleading, but you 2 also granted on your own a motion to amend the 3 stipulation, reflecting that KLI was the proper 4 party. And so, by them putting the stipulation in 5 saying that Keller Industries manufactured the 6 ladder and you granting the amendment saying that now 7 Keller Ladders is the proper party at interest, I 8 don't see any way they can come back and argue that 9 we didn't have the correct party in there. And if we 10 didn't, the motion to amend is appropriate procedure 11 to take.</p> <p>12 And, you know, by the way, what Mr. Kaulas 13 says may be the law in Illinois -- and it's 14 interesting that their motion does not cite any case 15 law, and Mr. Kaulas has not brought any case law up 16 today, although he says that the case law supports 17 his argument.</p> <p>18 I would like to cite to The Court a number of 19 cases to address this issue, and they are right on 20 point. And I cited them in my motion. And if I 21 could approach to The Court --</p> <p>22 THE COURT: You may.</p> <p>23 MR. HERMAN: Okay. There are several cases in 24 here. The first one is almost identical to this -- 25 to what happened here. Of course you're not going to</p> | <p>1 at 8 -- so Williams vs. Palm Beach County 2 Beach Community College is found at 867 3 And that case is pretty much directly on 4 what we're dealing with here.</p> <p>5 The next case is Thomas vs. Taylor Creek 6 Marina. Again, in that case, what happened was the 7 plaintiff named Taylor Creek Marina, Inc., and 8 instead the correct defendant was Taylor Creek Marina 9 of Fort Pierce. And The Court allowed an amendment 10 for that also.</p> <p>11 There is one case that I would like to, in 12 particular, cite and read from to The Court. That's 13 Palm Beach County vs. Savage Construction 14 Corporation, which is found at 627 So.2d 1332. In 15 that case, it's talking about amendments and the 16 Relation Back Doctrine. And The Court there cites 17 Rule 1.190(c) talking about amendments and related 18 back to the original pleading. And it talks about it 19 being well settled that the rule is to be construed 20 liberally.</p> <p>21 Then The Court goes on to say -- and I think 22 this is particularly applicable in this case in light 23 of the interrogatory responses that I have outlined 24 in my motion -- my response to their motion. It says 25 in the spirit of explaining the rules of liberality,</p> |
| <p>1 have the exact factual scenario, but basically in 2 that case, a college student brought an action 3 against Palm Beach College and a security 4 corporation. And what he did, was he named the 5 security company as Ace Security, Inc. and not Ace 6 Security Company. But in that case, and all of the 7 rest of the cases that you see up there, the company 8 that sued comes forward and says, hey, we're not the 9 company. Hey, we don't have any responsibility here.</p> <p>10 And that's not -- and that's the point that 11 you made, that they have a burden to come forward 12 to say something about it. And they didn't. And, in 13 fact, that kind of begs the question as to why did 14 they defend this entire case if they weren't the 15 responsible party?</p> <p>16 And that's, again, where you get indemnity and 17 liability confused. The fact of the matter is, the 18 jury found the ladder was defective and KLI -- 19 Mr. Kaulas is right. KLI and Keller Industries, in 20 my mind, are very, very similar companies, or at 21 least KLI is a successor, what we refer to as 22 successor corporation. Those cases that I handed you 23 are cases that talk about that.</p> <p>24 Just let me cite them for the record. 25 Williams vs. Palm Beach Community College is found</p> | <p>1 the -- sorry.</p> <p>2 The case that they are citing from 3 actually comes out of here, Cabbott vs. Clearwater 4 Construction. It says, In the spirit of explaining 5 the rules of liberality, the Florida Supreme Court 6 admonished litigants. Now the objective of all 7 pleading is merely to provide a method of setting out 8 the opposing contentions of parties. No longer are 9 we concerned with the tricks -- quote -- "tricks and 10 technicalities of the trade." The trial of a lawsuit 11 should be a sincere effort to arrive at the truth. 12 It is no longer a game of chess in which the 13 technique of the maneuver captures the prize.</p> <p>14 And that is exactly what the defendants are 15 trying to do here. They would have never tried this 16 case differently. It would have been the same 17 lawyers trying this case. And there is no prejudice 18 to KLI, or for that matter Keller Industries, who is 19 not around anymore. So even if I did sue them, the 20 responsibility is going to lay in the lap of KLI, and 21 there would be no difference in terms of who would 22 ultimately pay that judgment according to their 23 interrogatories.</p> <p>24 So the fact of the matter is they put a 25 stipulation into evidence. The stipulation was for</p> |

9 (Pages 30 to 33)

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| <p style="text-align: right;">34</p> <p>1 Keller Industries. I am asking -- I did at court, 2 and I think I did at trial, and I think this court 3 granted my motion to amend, to allow Keller 4 Industries to be added as a party. 5 The other cases I would cite is -- are Sexton 6 vs. Panning Lumber Company. Same issue about 7 naming a different company. I think that was a 8 successor company. And they looked at factors in 9 that case as to what constitutes a party that was 10 related or a successor company. 11 Clearly as outlined in my response to their 12 motion, I believe that there's enough there to show 13 that Keller Industries -- 14 THE COURT: Well, let me refer to 15 Interrogatory 2, if you would, please. Plaintiff's 16 Interrogatory 2. Have you got it there? 17 MR. KAULAS: Yes. 18 THE COURT: Please identify all responsible 19 entities, including name of the corporation and their 20 applicable insurance company, if any, who is 21 responsible for payment of the jury verdict or 22 settlement in this action should plaintiff prevail 23 in the instant action. 24 Response, "Other than those liabilities for 25 damages which are punitive, or exemplary in nature,</p> | <p style="text-align: right;">36</p> <p>1 Industries was the manufacturer of the ladder. 2 THE COURT: Please identify all responsible 3 entities including name of the corporation, and 4 applicable insurance company, if any, who is 5 responsible for payment of a jury verdict or 6 settlement in this action -- 7 MR. KAULAS: This action. 8 THE COURT: -- should plaintiff prevail in the 9 instant action. 10 MR. KAULAS: And the only entity that's being 11 sued here is Keller Ladders, Inc, KLI, Inc. Not 12 Keller Industries, Inc. 13 MR. HERMAN: Boy, I tell you. 14 THE COURT: Now you and I part ways on that 15 one. 16 MR. KAULAS: Well, I -- 17 THE COURT: But the action against -- the 18 action against Keller Ladders is for the manufacturer 19 and distribution of a defective ladder. 20 MR. HERMAN: Not only that, Judge. 21 MR. KAULAS: Judge, excuse me. If I may, the 22 manufacturer of the ladder is Keller Industries, 23 Inc. It has never been a defendant in this lawsuit. 24 Never. They have never filed a pleading against 25 Keller Industries, Inc. The plaintiff in this case</p> |
| <p style="text-align: right;">35</p> <p>1 or arise out of any statutory cause of action which 2 gives rise to any damages which are penal in nature, 3 KLI, Inc. and KLI, Inc., doing business in the State 4 of Florida as KLI Global, Inc. 5 MR. KAULAS: They were a defendant. They 6 would be responsible if, in fact, the plaintiff 7 proved a case against KLI. Of course. The response 8 is that -- that's the appropriate response. If you 9 prove -- 10 THE COURT: But it changed its name. It 11 didn't change anything else but its name. 12 MR. KAULAS: I'm sorry. What? 13 THE COURT: Your Keller Ladders, Inc. 14 changed its name to KLI, Inc. Only changed its name. 15 MR. KAULAS: Judge, the manufacturer is Keller 16 Industries, Inc. 17 THE COURT: Well, I'm not on the same -- 18 MR. KAULAS: The answer to the 19 interrogatory -- 20 THE COURT: The answer to the interrogatory 21 says KLI, Inc. is responsible. 22 MR. KAULAS: If you prove a case against KLI, 23 Inc. Not if you prove a case against Joe Smith, Joe 24 Blow, or Keller Industries, Inc. 25 MR. HERMAN: But they stipulated Keller</p> | <p style="text-align: right;">37</p> <p>1 sued an entity, which we have stipulated and they 2 have stipulated, did not manufacture the ladder. 3 That only became evidence during the course of our 4 case. 5 THE COURT: If you read the answers to the 6 Interrogatories 1 and 2, they're material to each 7 other. To me, it does not create an issue of whether 8 or not the right person has been sued. To me, it 9 clearly states that Keller Ladder, Inc. is the one 10 who is the proper party before The Court, and all the 11 pleadings and all the answers to interrogatories as 12 to the merits of the case, whether or not it was a 13 defective ladder, have been addressed by the Keller 14 Ladder, Inc. as if they knew everything that had 15 happened to this ladder, and were going to answer the 16 discovery as the real party of interest. Isn't that 17 true? 18 MR. KAULAS: No. 19 THE COURT: No? 20 MR. KAULAS: No. The -- 21 THE COURT: You didn't prepare these answers 22 to interrogatories? 23 MR. KAULAS: Yes. The answers -- 24 THE COURT: Were there not some answers in 25 here about how the ladder was manufactured?</p> |

10 (Pages 34 to 37)

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| <p>1 MR. KAULAS: Judge, excuse me. In order to 2 sue on a theory of successor liability as the 3 plaintiff now contends he should have sued, in order 4 to sue on a theory of assumption of liability based 5 upon a contract, all of that must be in a pleading. 6 You must plead it. You can't simply say after a 7 judgement, Oh, by the way, I want to change my theory 8 of liability here. 9 Because before this court, The Court doesn't 10 have any documentation which has the agreement 11 itself. It doesn't have anything other than the 12 speculation that these answers to interrogatories may 13 create liability. 14 Why -- the court should be asking Mr. Herman, 15 why, Mr. Herman, didn't you sue Keller Industries, 16 Inc? Why didn't you sue them? If you -- as 17 Mr. Herman's response is, I didn't have to sue them. 18 I didn't have to sue them. Then The Court should 19 say, well, then why, Mr. Herman, are you asking to 20 sue them now? 21 THE COURT: You're absolutely correct. You 22 are 100% correct. Couldn't argue with you about you 23 have to allege the standing of the defendant as a 24 party -- as a real party at interest. But also the 25 law says that you can amend your pleadings after the</p> | <p>1 that's why they won't amend the pleading, because 2 we raised the statute of limitations in defense, 3 because they didn't sue in an appropriate time. 4 MR. HERMAN: That's the whole purpose of the 5 Relation Back Doctrine. Mr. Kaulas may not be 6 familiar with that, but all the cases that I referred 7 to you there talk about the Relation Back Doctrine in 8 exactly these circumstances. 9 So the amendment if granted, which I believe 10 it was granted, would relate back to the time of 11 filings. And that is not a issue, and that is not a 12 prejudice -- 13 THE COURT: I am going to deny the motion for 14 a judgement notwithstanding the verdict in so far as 15 the amendment is concerned. And I think the only 16 thing that really needs to be amended is just the 17 style of the case to say that Keller Ladders, Inc. 18 is a successor to Keller Industries. 19 MR. HERMAN: And would The Court want me to 20 file a pleading to that? 21 THE COURT: Yes. Absolutely. Well, in order 22 -- an order allowing the amendment to read as 23 follows, and then that's what the -- that's what the 24 amendment will read. 25 MR. HERMAN: Okay.</p> |
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| <p>1 judgement to have the judgment conform to the -- or 2 amend your pleadings to have your pleadings conformed 3 to the judgment. 4 And I -- that's the whole purpose of that, is 5 when there is that type of mistake that comes up that 6 is not material to the -- not affect the case in 7 chief, and that was whether or not this ladder was 8 defectively manufactured, that the pleadings can be 9 amended after the judgement. 10 MR. KAULAS: To the dis- -- but to the 11 disadvantage of the defendant that has the respons- 12 -- has the right -- 13 THE COURT: How is the defendant disadvantaged 14 in this case? 15 MR. KAULAS: Because Keller Industries, Inc. 16 has the absolute right in the State of Florida to 17 rely upon the statute of limitations. It has the 18 absolute right as a defense. A defense. And by 19 saying after the fact it doesn't really make any 20 difference, you are depriving -- 21 THE COURT: Was the statute of limitations 22 raised as a defense in this case? 23 MR. HERMAN: No, it was not. 24 MR. KAULAS: They haven't pleaded -- they 25 haven't amended the pleading, Judge. They haven't --</p> | <p>1 THE COURT: Okay. Now the second one is on 2 the question of liability. Wasn't there a second 3 issue on that? 4 MR. KAULAS: I'm sorry. What -- yes, Your 5 Honor. 6 THE COURT: I thought you had a three-fold 7 argument in this thing. One was what you just 8 argued. The other one was question of whether or not 9 there was -- the evidence justified a verdict for the 10 plaintiff that the ladder was manufacturally 11 defective, and then -- 12 MR. KAULAS: There were two, Your Honor. 13 THE COURT: Two? Well, let's see. Okay. 14 This other one, on the -- another issue, the record 15 does not disclose whether The Court amended the joint 16 pretrial stipulation at trial. That issue is moot. 17 Let's hear the -- unless you abandoned that part of 18 it. 19 MR. KAULAS: Well, no, we didn't abandon it. 20 The record is clear. The Court did not allow an 21 amendment. 22 THE COURT: Okay. No. I mean as far as the 23 issue on the -- I said it was moot, that issue. 24 MR. KAULAS: Well, before we go further, 25 precisely what is The Court allowing Mr. Herman to</p> |

11 (Pages 38 to 41)

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| <p style="text-align: right;">42</p> <p>1 do, and what is Mr. Herman doing? Is Mr. Herman --</p> <p>2 THE COURT: Mr. Herman stated -- what it is</p> <p>3 that you want and then I will -- I will state what it</p> <p>4 is I'm granting.</p> <p>5 MR. HERMAN: Okay. Judge, the cases that I</p> <p>6 cited to you, I want to be sure that, in particular,</p> <p>7 the first one there, Palm Beach County --</p> <p>8 THE COURT: I don't need to hear the case</p> <p>9 again. You already argued those.</p> <p>10 MR. HERMAN: I want to --</p> <p>11 THE COURT: Check the language?</p> <p>12 MR. HERMAN: Yes, I do. That's exactly right.</p> <p>13 Yeah. What was filed there and granted was a motion</p> <p>14 for leave to amend complaint to substitute party</p> <p>15 defendant, and in the alternative add a defendant.</p> <p>16 That's what I would like to do here. And whether</p> <p>17 it's a success --</p> <p>18 THE COURT: Say it again.</p> <p>19 MR. HERMAN: Motion -- motion for leave to</p> <p>20 amend the complaint to substitute a party defendant,</p> <p>21 or in the alternative to add a party. That's my</p> <p>22 motion. And it really requires granted or denied.</p> <p>23 And you have already given your thoughts on the</p> <p>24 record with regard to it being a successor</p> <p>25 corporation.</p> | <p style="text-align: right;">44</p> <p>1 grant a motion, either/or motion without any</p> <p>2 pleading whatsoever, our position is that's</p> <p>3 inappropriate because we can't possibly respond to an</p> <p>4 either/or. But since that's what The Court has done,</p> <p>5 I have got to respond to each one.</p> <p>6 If The Court is granting a motion to</p> <p>7 substitute a party, I'm not sure who is being</p> <p>8 substituted for what. And I would ask Mr. Herman to</p> <p>9 inform us who he is substituting for.</p> <p>10 THE COURT: Okay. Let me say this, just to</p> <p>11 clarify it, if possible. As far as The Court is</p> <p>12 concerned, based on the answer to Interrogatories 1</p> <p>13 and 2, Keller Ladders, Inc. and Keller Industries,</p> <p>14 Inc. are one in the same, as far as I'm concerned,</p> <p>15 by virtue of the fact that Keller Ladders, Inc.</p> <p>16 assumed the liabilities of Keller Industries, Inc.</p> <p>17 So how the amendment is phrased, in order to</p> <p>18 accurately reflect that finding on my part is either</p> <p>19 adding Keller Industries, Inc. or merely stating</p> <p>20 that Keller Ladders, Inc. is a successor to the</p> <p>21 liabilities and to the responsibilities of</p> <p>22 Industries, Inc, Keller Industries, Inc.</p> <p>23 That's what I want to happen. That's the</p> <p>24 ruling on this case. So I'm going to just say that</p> <p>25 Keller Ladders, Inc. is a successor to the</p> |
| <p style="text-align: right;">43</p> <p>1 I just don't want to get caught up into that</p> <p>2 actually being a factual scenario or not. But I can</p> <p>3 understand The Court's thinking based on the</p> <p>4 interrogatories, because quite frankly that's what I</p> <p>5 think, too. So the motion should just be granted --</p> <p>6 THE COURT: In abundance with caution, I will</p> <p>7 grant the motion and add to it and/or successor</p> <p>8 corporation.</p> <p>9 MR. HERMAN: Thank you, Your Honor.</p> <p>10 THE COURT: It's covered in that standpoint.</p> <p>11 Okay. State the second part of the motion of</p> <p>12 liability.</p> <p>13 MR. HERMAN: And the -- with respect --</p> <p>14 THE COURT: I'm sorry. Did that answer your</p> <p>15 question?</p> <p>16 MR. KAULAS: I've got a response to that,</p> <p>17 because obviously -- Mr. Herman hasn't completed his</p> <p>18 thought.</p> <p>19 MR. HERMAN: All I was going to say is that</p> <p>20 The Court didn't mention if you were denying that</p> <p>21 portion of his motion with regard to this -- the</p> <p>22 different companies.</p> <p>23 THE COURT: That's correct.</p> <p>24 MR. HERMAN: Thank you.</p> <p>25 MR. KAULAS: Okay. The first thing, is to</p> | <p style="text-align: right;">45</p> <p>1 liabilities of Keller Industries, Inc. by virtue of</p> <p>2 the answers to the interrogatories of the Plaintiff 1</p> <p>3 and 2.</p> <p>4 And it did not seem that was ever an issue as</p> <p>5 to whether or not Keller Ladders, Inc. would be</p> <p>6 responsible in the event of a verdict, by virtue of</p> <p>7 the fact that it was not the actual manufacturer of</p> <p>8 the ladder.</p> <p>9 MR. KAULAS: By The Court's comment, The Court</p> <p>10 is not allowing the plaintiff to add Keller</p> <p>11 Industries, Inc. as a party defendant. The Court is</p> <p>12 ruling that based upon answers to interrogatories,</p> <p>13 The Court finds that KLI is responsible by virtue of</p> <p>14 answers to interrogatories.</p> <p>15 THE COURT: Is the real party at interest in</p> <p>16 this case by virtue of the answer to the</p> <p>17 interrogatories.</p> <p>18 MR. HERMAN: This is the gamesmanship that</p> <p>19 kind of, quite frankly, scares me with regard --</p> <p>20 THE COURT: I would like to state for the</p> <p>21 record, so if the appellate court looks it over they</p> <p>22 may say the form is not correct, but certainly the</p> <p>23 substance is correct.</p> <p>24 MR. HERMAN: I understand. That's what we</p> <p>25 have been battling in here today ever since this case</p> |

12 (Pages 42 to 45)

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1 was filed.
2 THE COURT: They are not going to reverse --
3 if, in fact, they feel as I do that Keller Ladder,
4 Inc. was the real party at interest by virtue of
5 that agreement, which is not in dispute, which is
6 actually the substance that's been furnished by the
7 defendant themselves, then they are not going -- I
8 don't believe, going to reverse me simply because I
9 couldn't accurately articulate it, if the substance
10 of my ruling is fairly made and they can understand
11 it.
12 MR. KAULAS: Okay.
13 THE COURT: Okay.
14 MR. KAULAS: The reason I'm asking, Judge, is
15 because this add-on motion, once again, we have never
16 had a pleading. So as a result, I can't address the
17 pleading which we have never had. I can't
18 affirmatively object on the basis of a -- I can't
19 affirmatively respond to a pleading which I have
20 never seen.
21 THE COURT: Well, I will state for the record
22 that you didn't seem to have any problem articulating
23 your argument by understanding it and knowing your
24 position, is that you object to any amendment because
25 -- for the reasons you have given today.

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1 MR. KAULAS: Correct.
2 THE COURT: Didn't seem to me you were
3 under any disability understanding what he was
4 attempting to do for lack of a written pleading.
5 MR. HERMAN: Well, there is a written
6 pleading.
7 THE COURT: I'm just saying, he has argued
8 that there is not.
9 MR. KAULAS: There is no written pleading
10 where the counsel has responded with --
11 MR. HERMAN: I'm sorry. You're right. There
12 is a motion.
13 THE COURT: In answer to your statement, sir,
14 you have articulated with great clarity your
15 position, and I hope I have understood your position,
16 and so the lack of a written motion has not, to me,
17 prevented you from making your position well known to
18 The Court.
19 MR. KAULAS: Fair enough. With reference to
20 the -- The Court's ruling, we would object to the
21 ruling for the following reasons:
22 Number 1, the answers to interrogatories do
23 not, in our position, create successor liability, do
24 not create indemnity. As a result, those answers to
25 interrogatories did not excuse the plaintiff from

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1 suing the appropriate defendant, which would have
2 been Keller Industries, Inc. The answers to
3 interrogatories, if, in fact, they do create
4 successor liability, create indemnity. Those answers
5 to interrogatories were never, if you will, converted
6 into a pleading, an amended pleading against my
7 client, in which it was alleged that my client was
8 responsible to the plaintiff by virtue of those
9 answers to interrogatories.
10 Next, those answers to interrogatories were
11 never offered into evidence during the course of the
12 case, before the trier of the fact, to determine
13 whether or not the trier of the fact would come to
14 the same conclusion that The Court has come to. We
15 do not believe that The Court, in essence, can stop
16 the defense that the defendant has raised by saying
17 these answers to interrogatories allow a substitution
18 of a party defendant after the fact. But The Court
19 is, in essence, ruling on an issue of indemnity
20 without any documentation whatsoever, which would
21 include the agreements between KU- --
22 THE COURT: Indemnity doesn't apply in this
23 case. I mean, indemnity comes by virtue of vicarious
24 liability. In this case Keller Ladders, Inc.
25 assumed that responsibility by virtue of their

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1 contract. So that's not vicarious. That's direct
2 and real liability.
3 MR. KAULAS: The Court -- The Court has never
4 seen the contract.
5 THE COURT: I'm just going by what you
6 described it.
7 MR. KAULAS: Well, the description of the
8 contract -- a description of the contract is not a
9 contract. In order to plead a contract, one must
10 attach a contract to a pleading, or at least plead
11 the substance thereof.
12 If, in fact, Mr. Herman's position was that
13 those answers to interrogatories created a cause of
14 action, then under those circumstances he should have
15 pleaded it. He hasn't even pleaded it now. And
16 therefore, we take the position that The Court is, in
17 essence, making a determination of contract liability
18 without ever seeing the contract. And as we take the
19 position, the contract calls for the -- various
20 things, including suing the appropriate party, which
21 would be Keller Industries, Inc. and a demand by
22 Keller Industries, Inc. for indemnity, not a ruling
23 of indemnity, if you will, under circumstances which
24 we understand The Court has ruled.
25 THE COURT: You're not suggesting Keller

13 (Pages 46 to 49)

Klein, Bury, Reif, Applebaum & Associates
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| <p style="text-align: right;">50</p> <p>1 Ladders, Inc. didn't answer the interrogatory 2 correctly by saying they assumed the responsibility. 3 I mean, I -- I'm just thinking the plain language of 4 the answer. That's all I'm looking at. 5 MR. KAULAS: If, in fact, that is an 6 appropriate interpretation of the interrogatory, then 7 it should have been pleaded. That's our position. 8 THE COURT: Oh. Oh. Oh. You said I had to 9 see the contract to know actually what it said, and 10 I'm just questioning that statement in view of the 11 fact that when you read the answer of the defendant, 12 the plain language of the answer is that it assumed 13 the liability. So I don't need to read the -- read 14 the contract in order to understand what they are 15 telling me now. If they are telling me that and it's 16 not correct, I should read the contract, that's 17 something else. But I'm not going to do that. 18 MR. KAULAS: I understand that. But I think 19 it assumes certain liabilities. 20 MR. HERMAN: Judge, one last thing. Since, 21 based on the proceedings, in terms of the preciseness 22 that Mr. Kaulas -- may I approach? 23 THE COURT: Let me give you a little hint. 24 When you're ahead, don't -- 25 MR. HERMAN: I understand, Judge. I'm not</p> | <p style="text-align: right;">52</p> <p>1 extended six inches, a minimum of six inches. That 2 was a fact that was required by physics. The ladder 3 couldn't possibly malfunction unless it was extended 4 six inches. 5 In this particular case, the only person that 6 hypothecated that the ladder was extended six inches, 7 and the person that, if you will, suggested that the 8 ladder was extended six inches, was the plaintiff's 9 expert, John Morris. And Morris admitted that in 10 order to have the ladder function as he claimed, it 11 must be extended six inches. 12 The plaintiff testified unequivocally that he 13 never extended the ladder at all. Unequivocally. He 14 never extended the ladder at all. Thus the 15 testimony, we move to -- to strike the testimony of 16 John Morris as being conjecture. The Court denied 17 that motion. We reasserted the same motion at the 18 end of all the evidence, and that was denied. 19 The law, as I understand it, is clear that an 20 expert's testimony can only be based upon 21 uncontradicted evidence. And in this particular 22 instance, the uncontradicted evidence, according to 23 the plaintiff, the only actual witness was that he 24 never extended the accident ladder. 25 Now, there was conflicting evidence as to</p> |
| <p style="text-align: right;">51</p> <p>1 going to re-argue anything. The only thing I need 2 added to the order is that this amendment relates 3 back to the initial time that we were filing, 4 pursuant to all those cases. 5 THE COURT: Okay. The next issue. 6 MR. KAULAS: Excuse me. We would object. You 7 can't relate a pleading back to the beginning of time 8 without any legal justification. 9 MR. HERMAN: It wasn't the beginning of time. 10 You know what? Quite frankly -- 11 THE COURT: The law says that. 12 MR. HERMAN: -- the law -- if you had some law 13 to support those contentions -- 14 THE COURT: Argue to me, please. 15 MR. HERMAN: The cases I have given you all 16 talk about the Relation Back Doctrine. 17 THE COURT: I don't even have to put that in 18 the order. I mean, it's just understood legal maxim 19 that relates back to the original complaint. 20 MR. HERMAN: Thank you, Your Honor. 21 THE COURT: Okay. The next argument, please. 22 MR. KAULAS: The next argument deals with the 23 -- The Court may recall that the theory of liability 24 in the case was -- required a certain fact. A theory 25 of liability required that the accident ladder be</p> | <p style="text-align: right;">53</p> <p>1 whether or not the ladder telescoped. There were two 2 eyewitnesses who said the ladder telescoped. And the 3 defense expert's hypothecated that that was unlikely 4 based upon his reconstruction. The fact that there 5 were three witnesses that testified the ladder 6 telescoped, the plaintiff and two others, is 7 irrelevant to the issue of liability. The issue of 8 liability was not based upon the concept that the 9 ladder, if extended, could telescope. The theory of 10 liability was that the ladder had to be extended six 11 inches, and then telescoped. 12 In order to telescope the ladder, all one has 13 to do is extend the ladder two-and-a-half inches. 14 Thus, the plaintiff's theory that the ladder 15 telescoped, the evidence that the ladder telescoped 16 was not inconsistent with the fact that the plaintiff 17 may have extended the ladder two-and-a-quarter 18 inches. But the liability would not attach to that 19 factual situation, regardless of the circumstances. 20 The plaintiff simply extended the ladder 21 two-and-a-quarter inches, and the ladder telescoped. 22 The liability claim being made did not come -- 23 come into focus. It was not part and parcel of the 24 evidence in the case. So therefore, the expert's 25 testimony, in our opinion, should have been stricken,</p> |

14 (Pages 50 to 53)

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| <p style="text-align: right;">54</p> <p>1 and the theory of liability, of course, should have 2 been dismissed, since the physics could not possibly 3 have been created in order to support the theory 4 of liability. 5 Thank you. 6 THE COURT: Thank you, sir. 7 MR. HERMAN: Judge, this will be a brief 8 response. Mr. Kaulas ignores what the jury heard and 9 saw. There were two witnesses, if you remember, that 10 heard the ladder telescope, and also after the fact 11 saw that the ladder was in a, lack of a better word, 12 somewhat of a telescoped position. The only way that 13 can happen is that if at some point it's extended, 14 and then the ladder telescopes like it did from the 15 roof. 16 And not only that. Mr. Kaulas' argument 17 completely ignores the fact that this ladder did not 18 come with a fly-lock lock, a quick-latch foot, is 19 what we called it. And we showed the jury a 20 Louisville Ladder that had a quick latch, which would 21 lock the ladder in place so that you could not extend 22 it from where Mr. McCormack was. 23 So that being the case, the jury has spoken. 24 They considered the evidence. And I don't think 25 there's any basis in this record to either strike</p> | <p style="text-align: right;">56</p> <p>1 those circumstances, we believe it was error for The 2 Court to allow the evidence of the quick latch in. 3 THE COURT: Thank you. Well, I believe then, 4 and I believe now it was sufficient evidence to 5 create issues of fact for the jury to determine. So 6 the motion is denied. Okay. I have got this final 7 judgement. Have you seen this final judgement? The 8 question is, can I sign it in its present form, or 9 should we wait -- 10 MR. HERMAN: Judge, I would rather wait and I 11 will resubmit. 12 THE COURT: So resubmit a judgement, give him 13 a copy of it, and with an opportunity to object to 14 its form, not agree to it as such because he's made 15 an argument quite clear on that. And if you would 16 take your cases back so I don't have to -- 17 MR. SACHS: Judge, I want to give you an 18 order. I just want to show it to Mr. Herman denying 19 our motion for a JNOV. It's very simple. 20 THE COURT: Okay. That's fine. 21 MR. HERMAN: Okay. 22 THE COURT: Now, I see in there that -- is 23 this okay to sign this, gentlemen? 24 MR. SACHS: Yeah. I just gave it to 25 Mr. Herman.</p> |
| <p style="text-align: right;">55</p> <p>1 Mr. -- Dr. Morris as a witness or to grant this 2 judgment NOV based on those contentions by the 3 defendant. Thank you. 4 THE COURT: Okay. Anything else? 5 MR. KAULAS: Yes. Obviously the quick latch 6 argument, the quick latch was no evidence -- not only 7 no evidence. The evidence was that the quick latch 8 was not manufactured until after this ladder -- the 9 subject ladder was manufactured. That was Number 1. 10 The patent was applied for before this particular 11 ladder was manufactured. 12 But most importantly, in order to utilize a 13 quick latch, one would have to have some access to 14 the patent, some access to license. There was no 15 evidence whatsoever that Louisville, the holder of 16 the patent, licensed this, agreed to license it, or 17 did anything with reference to licensing. 18 So our position at the time, of course, was 19 The Court erred by allowing this device into evidence 20 when there was no -- there was nothing to suggest 21 that the defendant would have even the right to use 22 such a thing if, in fact, they chose to do so. And 23 of course, there was no evidence that such -- by any 24 witness in the case that anybody had ever seen the 25 application for the patent. So therefore, under</p> | <p style="text-align: right;">57</p> <p>1 MR. HERMAN: The order? Yes. 2 THE COURT: I see also the order retains 3 jurisdiction for the establishment of costs. And if 4 you can't agree to what the costs are, you don't have 5 to come back here in a hearing. We can set it up on 6 a telephone conference. 7 MR. HERMAN: Okay. 8 THE COURT: For that purpose -- unless you 9 want to come down here to Pinellas County. It's a 10 very pretty county. We've got some of the best 11 beaches in the world. 12 MR. KAULAS: Your Honor, I wish to file this 13 at my -- my affidavit with the list. 14 THE COURT: That's fine. I am going to let it 15 be received. 16 MR. HERMAN: Over still -- my objection. 17 THE COURT: Over your objection. I haven't 18 got a clerk here, so I will give it to the clerk. 19 MR. HERMAN: Okay. 20 THE COURT: Well, this file is in Broward 21 County, so I'm going to write on here, accepted for 22 filing on 3/27/06 by Senior Circuit Judge Robert E. 23 Beach, and then you send this to the clerk's office 24 in Broward County. 25 MR. SACHS: I will do a notice of filing on</p> |

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| <p>58</p> <p>1 it, is what I will do.</p> <p>2 THE COURT: That's fine.</p> <p>3 MR. SACHS: I guess the same thing regarding</p> <p>4 your order denying our motion. When he brings it</p> <p>5 back, I will file the original in Broward.</p> <p>6 THE COURT: That's fine.</p> <p>7 MR. SACHS: Is that okay with you?</p> <p>8 MR. HERMAN: I didn't hear what you said.</p> <p>9 THE COURT: Thank you, gentlemen.</p> <p>10 MR. KAULAS: Thank you judge.</p> <p>11 THE COURT: It was an interesting case, and I</p> <p>12 will look forward to reading it in the Southern</p> <p>13 Reporter.</p> <p>14 THE COURT REPORTER: Do you need it</p> <p>15 transcribed, Mr. Sachs?</p> <p>16 MR. SACHS: Yes.</p> <p>17 THE COURT REPORTER: And would you like a mini</p> <p>18 or ASCII?</p> <p>19 MR. SACHS: Mini.</p> <p>20 THE COURT REPORTER: And send it to you?</p> <p>21 MR. SACHS: You can send it to me.</p> <p>22 THE COURT REPORTER: Would you like a copy,</p> <p>23 sir?</p> <p>24 MR. HERMAN: Not yet.</p> <p>25 (Whereupon, the proceedings were concluded at</p> | <p>60</p> <p>1 CERTIFICATE OF REPORTER</p> <p>2</p> <p>3 STATE OF FLORIDA</p> <p>4 COUNTY OF HILLSBOROUGH</p> <p>5</p> <p>6 I, AMY T. DesCHENES, certify that I was authorized</p> <p>7 and did stenographically report the foregoing deposition; and</p> <p>8 that the transcript is a true record of the testimony given</p> <p>9 by the witness.</p> <p>10</p> <p>11 I further certify that I am not a relative, employee,</p> <p>12 attorney, or counsel of any of the parties, nor am I a</p> <p>13 relative or employee of any of the parties' attorneys or</p> <p>14 counsel connected with the action, nor am I financially</p> <p>15 interested in the action.</p> <p>16 Dated this _____ day of _____, 2006.</p> <p>17</p> <p>18 _____</p> <p>19 AMY T. DESCHENES</p> <p>20 COURT REPORTER</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> |
| <p>59</p> <p>1 10:27 a.m.)</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> | |

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